NO. 77-967

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1977

ERNEST CROWNOVER and ERNEST CROWNOVER,
surviving spouse of Ardvce Crownover,
PETITIONER

v.

THOMAS KENNEDY, M.D. and THEODORE K.
GLEICHMAN, M.D., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF
COLORADO

PETITION FOR WRIT OF CERTIORARI

MELLMAN, MELLMAN AND THORN, P.C.
Douglas W. Johnson
1337 Delaware
Denver, Colorado 80204 573-7600
ATTORNEYS FOR PETITIONER

December, 1977

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PETITION FOR WRIT OF CERTIORARI

TO: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Ernest Crownover, hereby petitions for a Writ of Certiorari to review the decision of the Supreme Court of the State of Colorado affirming the judgment of the Colorado Court of Appeals. The Colorado Supreme Court held

that in Colorado the Statute of Limitations for wrongful death runs from the date of injury, not the date of death.

OPINIONS BELOW

The Opinion of the Colorado Supreme Court has not yet been reported officially or unofficially. The Opinion of the Colorado Court of Appeals has not been reported officially, but may be found at 554 P.2d 313. Copies of the opinions for both the Supreme Court and the Court of Appeals are appended hereto as Appendices "A" and "B". The ruling of the trial court is appended hereto as Appendix "C".

JURISDICTION

This Petition for Writ of Certiorari involves the validity of a state Statute of Limitations which is drawn into question on the ground of it being repugnant to the Constitution of the United States and

the rights and privileges set up thereunder and decisions of this Court.

The decision sought to be reviewed was entered by the Colorado Supreme Court on September 19, 1977. Rehearing was denied on October 11, 1977. The Court granted Petitioner a Stay of Mandate through and including December 11, 1977 within which to petition for Certiorari.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C.A. § 1257(3).

QUESTIONS PRESENTED FOR REVIEW

Is it constitutionally permissible for a Statute of Limitations for wrongful death to run from the date of injury, rather than the date of death? That is to say, does such a Statute of Limitations deny due process and equal protection of the laws to a potential claimant

for a wrongful death?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitution of the United States of America, Amendment XIV, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Colorado Revised Statutes 1973, 13-21-202, provides:

> Action notwithstanding death. When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party in-

> jured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured.

3. Colorado Revised Statues 1973, 13-21-204, provides:

> Limitation of action. All actions provided for by sections 13-21-201 to 13-21-203 shall be brought within two years from the commission of the alleged negligence resulting in the death for which suit is brought.

STATEMENT OF THE CASE

Petitioner originally filed his Complaint on September 12, 1973 naming Theodore K. Gleichman, M.D. as a defendant in a wrongful death action. Then, as a result of information obtained through discovery proceedings, Petitioner, on October 24, 1974, filed a motion to join Thomas Kennedy, M.D. as a party defendant

in the action. That motion was granted and on November 13, 1974 Petitioner served a Summons and Amended Complaint on Respondent Thomas Kennedy, M.D. With regard to Respondent Kennedy, Petitioner alleged in his Amended Complaint that Respondent Kennedy was negligent in reading x-rays of Petitioner's wife's chest on July 19, 1971 and failed to discover a cancerous growth. That as a result of this negligence, Petitioner's wife died on January 7, 1973.

Discovery has shown that the cancerous growth was discovered during surgery on April 26, 1972.

The Summons and Amended Complaint were served within two years from the date of death, but more than two years after the discovery of the cancer.

Respondent Thomas Kennedy, M.D. moved for summary judgment on the grounds that the cause of action for wrongful

death against him was barred by the Statute of Limitations.

The Motion for Summary Judgment was granted by the trial court. The Colorado Court of Appeals and Supreme Court affirmed.

Petitioner has argued the constitutional matters in the courts below. Refrences are made to these issues in the Briefs submitted to the courts by Petitioner. The Court of Appeals and Supreme Court did not address the constitutional issues except that the dissenting Opinion in the Supreme Court made reference to the constitutional issues involved.

SUMMARY OF REASONS FOR GRANTING WRIT OF CERTIORARI

The Statute of Limitations for wrongful death in Colorado denies equal protection of the laws because it gives some survivors no time in which to file an action for wrongful death and gives other survi-

vors varying periods within which to file such an action. This denies equal protection of the law in the traditional sense.

Moreover, access to the courts and the right to sue are fundamental rights and a state cannot deny them unless there is a compelling state interest. No such compelling state interest is present in this case.

The Statute of Limitations for wrongful death in Colorado also denies due process of law by extinguishing some causes of action before they ever arise and by giving varying times in which to file actions for wrongful death. As the Dissents in the courts below have stated, such a Statute of Limitations is "absurd", manifestly unreasonable and denies due process of law.

The only other Statute of Limitation that is the same as Colorado's is the Statute of Limitations under the Death on

the High Seas Act. There has been confusion in the interpretation of that act. The majority of courts which have interpreted the Death on the High Seas Act, however, have held that the Statute of Limitations for wrongful death must run from the date of death. This confusion should be resolved.

No Statute of Limitations can take away a claim before a claimant has had an opportunity for his day in court. This is what the Colorado Statute does and it is patently unconstitutional.

ARGUMENT

I. EQUAL PROTECTION. Under the position taken by the Colorado Supreme Court, the Statute of Limitations for wrongful death can run before a death even occurs. It is also entirely possible for the Statute to run one day after death, requiring the grief stricken sur-

vivors to file a law suit on the way to the cemetery. The length of the Statute of Limitations may vary from nothing to two years depending on the facts of the particular case.

These varying results clearly deny equal protection of the laws under both traditional equal protection and under the "new" equal protection.

These varying limitation periods are not dependant on anything the survivors may or may not have done, but merely on the fortuitous "date of injury" of the deceased. There is no reason to treat any of the survivors differently from the others. They should all have an equal opportunity to pursue their claims for the wrongful death of a loved one. It is unconscionable to deny a child a right of action for money for his upbringing simply because his father died two years and one day from the date of his injury.

This Court, in Shapiro v. Thompson, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), summarized the traditional test of equal protection:

> Under the traditional standard, equal protection is denied only if the classification is "without any reasonable basis," Lindsley v. Natural Carbonic Gas Co. 220 US 61, 78, 55 L Ed 369, 377, 31 S Ct 337 (1911); see also Flemming v Nestor, 363 US 603, 4 L Ed 2d 1435, 80 S Ct 1367 (1960).

There is certainly no reasonable basis for the classification this Statute of Limitation provides. The Legislature obviously intended to give survivors of the deceased a cause of action and under the Fourteenth Amendment, each of these potential claimants must have an equal right of access to the courts.

This Court has held, in Bounds v. Smith, ____ U.S. ____, 52 L. Ed. 2d 72, 97 S. Ct. ___ (1977), that access to the courts is a "fundamental constitu-

tional right". Although that case dealt with the right of access in a criminal case, the same rule ought to apply in civil matters. The right to sue is one of the most fundamental rights in our justice system and the very foundation of our civil law system. To deny these rights arbitrarily is most unconscionable.

The Court in Shapiro v. Thompson, supra, dealt with such fundamental rights and held as follows:

> . . . Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest.

Nowhere is there a showing that there is any compelling state interest permitting different survivors different rights of access to the courts.

II. DUE PROCESS. This Court has, early on, set Constitutional due process standards for statutes of limitation. The

Statute of Limitation in this case falls far short of those standards. Wilson v. Iseminger, 185 U.S. 54, 46 L. Ed. 804, 22 S. Ct. 573 (1902), provides some of these standards:

> ". . . Statutes of limitation are passed which fix upon a reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establish a legal presumption against him that he has no rights in the premises. Such a statute is a statute of repose. Every government is under obligation to its citizens to afford them all needful legal remedies; but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time." Cooley, Const. Lim. 5th ed. 448; Bell v. Morrison, 1 Pet. 351, 7 L. ed. 174; Leffingwell v. Warren, 2 Black, 606, 17 L. ed. 263.
>
> . . . It may be properly conceded that all statutes of limitation must proceed

> on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. [Emphasis supplied. See also Captain Grande Bank of Mis. Indians v. Helix Irr. Dist., 514 F.2d 465 (1975)]

The Statute as interpreted by the Colorado courts can bar existing rights of claimants without affording them an opportunity to litigate their claims. Hence, as Wilson v. Iseminger, supra holds, the Statute of Limitations is an unlawful attempt to extinguish rights arbitrarily, regardless of the fact that it purports to be a usual Statute of Limitations.

This issue has been addressed by states other than Colorado. The Supreme Court of Arizona, in Rogers v. Smith,

Kline and French Laboratories, 429 P.2d 4, (Ariz., 1967), held that:

> The cause of action for wrongful death does not exist in favor of the decedent, rather it is for the benefit of survivors. In re estate of Milliman, 101 Ariz. 54, 415 P2d 877 (1966) ...Since the cause of action for her wrongful death did not come into being until her death there never was nor could there have been a cause of action in her favor for her wrongful death ... The paradox in urging that a limiting period for a wrongful death action ceases to run at death is apparent, since the action does not come into existence until death ... A cause of action accrues whenever one person may sue another. The statute of limitations then begins to run. Norton v. Steinfeld, 36 Ariz. 536, 228 P.3 (1930). The beneficiaries under the act cannot sue until the wrongful death occurs. Thus, the cause of action accrues at death and the statute begins to run.

The Supreme Court of Michigan in Coury v. General Motors Corporation, 137 N.W.2d

134 (Mich., 1965), also held that the cause of action and the Statute of Limitations begins to run on the date of death. The Court poses the question:

> How could a right of action under the death act accrue at all if death never occurred in consequence of the injury or accrue before the occurrence of death?

We agree with the reasoning - how could it?

In an analogous situation, this Court in Louisville, Evansville & St. Louis Railroad Company v. Clarke, 152 U.S. 230, 38 L. Ed. 422 (1840), held that:

> [The personal representative] cannot sue until the cause of action accrues, and the cause of action given by the statute for the exclusive benefit of the widow and children of next of kin cannot accrue until the person dies. [Emphasis supplied]

III. DEATH ON THE HIGH SEAS ACT. The only other statute Petitioner can find that is the same as Colorado's Statute of Limita-

tions is found in the Death on the High Seas Act, 46 U.S.C. 763. Although there has been some confusion, the majority of cases interpreting the Statute, hold that the limitation period runs from the date of death. This, of course, is the only sensible result and the only one permitted by the Constitution.

For example, see Abbott v. United States, 207 F. Supp. 468 (D.C.N.Y. 1962), where the Court stated that to hold that a Statute of Limitations for wrongful death runs from any time but the date of death "would lead to an absurd result." [Emphasis supplied]

The Court in Williams v. Moran, Proctor, Meuser & Rutledge, 205 F. Supp. 208 (D.C.N.Y. 1962), held that:

> The very title of the Death on the High Seas by Wrongful Act statute and the reading together of Sections 761 and 763 of Title 46 U.S.C.A. convince me that there can be no

> actionable wrongful act, neglect or default until a death occurs. The statute obviously was never intended to deal with a nonactionable wrongful act, neglect or default. It could only deal with an actionable wrongful act, neglect or default of which death is an indispensable ingredient.

See also Brown v. Anderson-Nichols Datkiewicz v. Seas Shipping Company, 203 F. Supp. 89 (D.C.N.Y. 1944); Pickles v. F. Leyland & Company, 10 F.2d 371 (D.C. Mass. 1925).

SUMMARY

It is clear that the Colorado Statute of Limitations for wrongful death has a period of limitation which, depending on the circumstances, can range from no time in which to file an action up to two years to file an action. This clearly denies equal protection to the survivors who are allowed varying times in which to file their action regardless of any conduct on

their part. Moreover, Petitioner has been denied his fundamental right of equal access to the courts and no compelling state interest is evident.

As the dissenting Opinions below have stated, this Statute of Limitations leads to an absurd result and is manifestly unreasonable and a denial of due process.

The dissenting Opinion in the Colorado Supreme Court, citing Owens v. Brochner, 172 Colo. 525 (1970), made the following observation:

> "To say to one who has been wronged, 'You had a remedy, but before the wrong was ascertainable (or available) to you, the law stripped you of your remedy,' makes a mockery of the law." (Parenthetical words added). 172 Colo. 525, 530, 474 P.2d 603, 606, quoting Berry v. Braner, 245 Ore. 307, 421 P.2d 996 (1966).

WHEREFORE, Petitioner requests that this Honorable Court issue a Writ of Certiorari to the Colorado Supreme Court.

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APPENDIX "A"

IN THE SUPREME COURT
STATE OF COLORADO

No. C-1047

ERNEST CROWNOVER and ERNEST CROWNOVER, surviving spouse of Ardyce Crownover,	)	
Petitioner,	)	CERTIORARI TO THE COLORADO COURT OF APPEALS
vs.	)	
THEODORE K. GLEICHMAN, M.D.	)	
Defendant,	)	
and	)	
THOMAS KENNEDY, M.D.,	)	
Respondent.	)	

Certiorari to the Colorado Court of Appeals. Judgment affirmed.

Mellman, Mellman and Thorn, P.C., Douglas W. Johnson, for petitioner. Paul D. Renner, for respondent.

MR. JUSTICE KELLEY delivered the opinion of the Court.

We granted certiorari to review the decision of the court of appeals in

Crownover v. Gleichman, ____ Colo. ____, 554 P.2d 313 (1976), construing the statute of limitations which is part of the wrongful death act, section 13-21-201 to 204, C.R.S. 1973. We affirm.

The question presented for review is whether the statute of limitations, section 13-21-204, runs from the date of death or from the wrongful act, neglect, or default which resulted in the death.

The issue arises in the following factual context. Petitioner filed a wrongful death complaint against Theodore K. Gleichman, M.D., on September 12, 1973. On October 24, 1974, as the result of information obtained through discovery proceedings, petitioner moved to join Thomas Kennedy, M.D., as a defendant. That motion was granted, and on November

13, 1974, petitioner served a summons and amended complaint on respondent Kennedy. The alleged negligence of respondent Kennedy consisted of the failure to discover a cancerous growth in petitioner's wife's chest when he examined her X-rays on July 19, 1971. The cancer was discovered during surgery on April 26, 1972. Petitioner's wife died on January 7, 1973, allegedly as the result of respondent Kennedy's negligence.

Thus, it appears that the summons and amended complaint were served within two years of the date of death, but more than two years after the discovery of the cancer. Respondent Kennedy thereupon moved for summary judgment on the ground that the claim for wrongful death against him was barred by the statute of limita-

tions. The motion was granted and the court of appeals affirmed.

The petitioner contends that a statute of limitations cannot begin to run until the cause of action accrues and that to hold that the statute of limitations, under the wrongful death act, begins to run before death occurs creates an anomalous situation. It is possible, petitioner argues, for the statute of limitations to run before death occurs and thus bar the claim. Petitioner continues:

> The Legislature obviosly intended to give survivors of the deceased a cause of action for the death. This cannot be accomplished by extinguishing a cause of action before it ever arises.

Colorado adopted its wrongful death

act in 1877, and it remains unchanged insofar as it is material to our discussion.[1] Colorado's wrongful death act was patterned after Lord Campbell's Act which was passed by the English Parliament in 1846.[2] Had the General Assembly followed the limitations provision as closely as it did the other provisions of Lord Campbell's Act, this controversy would not be here. However, the departure is crucial as is readily apparent from an examination of the respective texts.

Section III of Lord Campbell's Act, in pertinent part, provides:

> and that every such action shall be commenced within Twelve Calendar Months <u>after the death of such deceased Person</u>. [Emphasis added]

Whereas the corresponding provision of the Colorado statute states:

> All actions provided for by sections 13-21-201 to 13-21-203 shall be brought within two years from the commission of the alleged negligence resulting in the death for which suit is brought. [Emphasis added.]

Although we could speculate as to why the first General Assembly elected not to follow Lord Campbell's Act in respect to the limitations provision, we would still be faced with the task of interpreting the language used. Although the language of our statute is arguably less precise than in the English law, it inevitably leads to the conclusion that it sets a different time for the commencement of the running of the statute of limitations.

This court did not have occasion to apply the statute until 1949 in Fish v.

Liley, 120 Colo. 156, 208 P.2d 930 (1949). The court recognized that this statutory action is not a "survival" statute to recover for a personal injury but is a new and different kind of action to recover compensation for death. See Prouty v. Chicago, 250 Ill. 222, 95 N.E. 147 (1911). The court in Fish held that: "the statute of limitations begins to run immediately upon the happening of the wrongful act,..." [Emphasis added.]

The factual situation in Fish v. Liley is not parallel to that here. This may have occasioned statements in Fish from which the petitioner drew some comfort. However, in Franzen v. Zimmerman, 127 Colo. 381, 256 P.2d 897 (1953), a wrongful death case where the tort occurred December 5, 1947, death occurred

June 4, 1949, and the complaint was filed July 28, 1950, the court, without citing Fish v. Liley, said:

> The action not having been filed within two years after the commission of the alleged negligence, said to have resulted in the death of the injured husband, it is barred by section 4,....

The petitioner interprets our holding in DeCaire v. Public Service Co., 173 Colo. 402, 479 P.2d 964 (1971), as supportive of his position. The trial court and the court of appeals cited it in support of the contrary view. The basic issue in DeCaire related to the question of when the injury occurred. We there held that the statute of limitations begins to run when the claimant has been injured or damaged by the alleged negli-

gence.[3]

In the instant case the injury or damage from Dr. Kennedy's alleged negligence was known or should have been known on April 26, 1972, when the deceased underwent surgery and the doctors discovered large areas of cancerous tissue in her chest. It was not until November 13, 1974, that Dr. Kennedy was served with a summons, more than two years from the "discovery" of the alleged negligence. See Owens v. Brochner, 172 Colo. 525, 474 P.2d 603 (1970).

Further, without torturing the language of the statute, it is difficult to see how one could interpret the language of the statute to mean anything other than what it says -- "all actions... shall be brought within two years from

from the commission of the alleged negligence resulting in the death for which suit is brought." If this is an unfair result, the remedy for its correction lies with the General Assembly.

Finally, we must adhere to the well-established rule of statutory construction that when a legislature repeatedly reenacts a statute which has theretofore received a settled judicial construction, there can be no doubt as to the legislative intent. In such circumstances, it must be considered that the particular statute is reenacted with the understanding that there be adherence by the judiciary to its former construction. Herbertson v. Russell, 150 Colo. 110, 371 P.2d 422 (1962), and cases cited therein.

The judgment is affirmed.

Mr. Justice Lee and Mr. Justice Erickson do not participate.

Mr. Justice Carrigan dissents.

Mr. Justice Carrigan dissenting:

I respectfully dissent.

Judge Smith in his lucid dissent in the Court of Appeals pointed out that the decision reached there (and today affirmed here) blindly follows the words of Mr. Justice Kelley's opinion in DeCaire v. Public Service Co., 173 Colo. 402, 479 P.2d 964 (1971) without the slightest regard for the rationale of that decision. See Crownover v. Gleichman, ____ Colo. App. _____, 554 P.2d 313, 316-17 (1976). DeCaire held that the statute of limitations did not commence to run at the time of the negligent act which ultimately gave rise to the claim for relief. Had

the negligence activated the statute of limitations in DeCaire, the claim would have been barred. Thus the ratio decidendi of that case indicated a liberal attitude in interpreting the statute of limitations to avoid harsh and unjust results. The gist of DeCaire is its holding that a statute of limitations does not commence running until the tort giving rise to the claim has been completed by occurrence of the injury which is the sine qua non of the tort. In a wrongful death action that injury is the death, for there can be no wrongful death action unless there is a death.

To hold, as the majority holds today, that a statute of limitations begins to run to bar a wrongful death action, and may actually bar such an action, before

the death occurs, is -- in the language of Judge Smith -- absurd.

Indeed, in the case before us, if the decedent had survived only four months longer than she did, the rule today adopted would have required holding that her husband's claim for her wrongful death was barred before she died. That rationale would require that we either hold the statute of limitations unconstitutional as a denial of due process or overrule our previous holdings that a statute of limitations cannot take away a claim for relief before the claimant has an opportunity for his day in court. Owens v. Brochner, 172 Colo. 525, 474 P.2d 603 (1970); Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944).

The majority opinion totally over-

looks the fact that the malpractice claim and the wrongful death claim are two different claims held by different claimants. Instead the two claims are treated as if they were a single "cause of action." Moreover, the totally separate and different statute of limitations governing malpractice (Section 13-80-105, C.R.S. 1973) is treated as if it were the same statute that governs wrongful death. (Section 13-21-204, C.R.S. 1973). As a result of this confusion the two-year malpractice statute of limitations which commenced to run against the wife's claim for malpractice is held to have barred the husband's separate claim for wrongful death about four months after the death claim came into existence. So long as the wife lived, the husband had no control

over her claim for malpractice. He could not have filed any action to recover general damages for her injuries, for that action belonged to her. Thus when the malpractice statute of limitations ran, it ran against her claim only. The effect of the majority opinion is to hold that the separate wrongful death claim owned by her surviving spouse is somehow barred about four months after her death by a statute which commenced running against a totally separate claim owned by her. It is fundamental that the wrongful death statute created in the plaintiff husband a new claim for relief upon occurrence of the death. Thus the two-year statute of limitations governing wrongful death actions could not have commenced to run against the husband until

his wife died. At her death, the two-year malpractice statute of limitations, which had been running against her malpractice claim (except possibly for loss of consortium) the malpractice statute of limitations could not have run to bar the action which did not yet exist -- the wrongful death action.

Statutes of limitations are enacted for the salutary purposes of discouraging delay and forestalling prosecution of stale claims. For nearly all torts in Colorado, including most professional negligence, the statute of limitations is six years. (Section 13-80-110, C.R.S. 1973). Thus the medical profession already has been provided a privileged sanctuary by enactment of the special two-year statute of limitations covering pro-

fessional negligence by physicians. Today's decision -- with its adoption of a four-month limitation, on these facts, and complete immunity from suit if the malpractice victim dies two years or more after the malpractice, will not well serve the long-term interests of the healing arts or of sound public policy. Inordinately short statutes of limitations, or doubts regarding the meaning of such statutes, simply force attorneys to file actions as soon as possible rather than risk having them barred. Under those conditions, many actions are filed which would not have been filed had there been time for careful investigation and medical consultation.

In my view the majority have employed a statute intended as a shield against

stale claims as a sword to cut off access to justice. As this Court recognized in Owens v. Brochner, supra: "To say to one who has been wronged, 'You had a remedy, but before the wrong was ascertainable (or available) to you, the law stripped you of your remedy,' makes a mockery of the law." (Parenthetical words added). 172 Colo. 525, 530, 474 P.2d 603, 606, quoting Berry v. Braner, 245 Ore. 307, 421 P.2d 996 (1966).

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1. G. L. § 878; G. S. § 1031; R. S. 08, § 2057; C. L. § 6303; CSA, C. 50, § 2; CRS 53, § 41-1-2; C.R.S. 1963 § 41-1-2.

2. Lord Campbell's Act, 9 & 10 Vict., ch 93 (1846).

3. This court as recently as 1974,

in Ferrari v. Dist. Ct., 185 Colo. 136, 522 P.2d 105, in obiter dictum, noted that "our statute of limitations relating to death cases commences with the time of injury. C.R.S. 1963, 41-1-4. See Fish v. Liley, 120 Colo. 156, 208 P.2d 930 (1949)."

APPENDIX "B"

IN THE COURT OF APPEALS
STATE OF COLORADO

No. 75-543

ERNEST CROWNOVER and ERNEST CROWNOVER, surviving spouse of Ardyce Crownover,	)	
Plaintiff-Appellant,	)	
v.	)	
THEORORE K. GLEICHMAN, M.D.	)	July 8, 1976
Defendant,	)	Division II
and	)	Coyte, Smith and Van Cise, JJ.
THOMAS KENNEDY, M.D.,	)	
Defendant-Appellee.	)	

Appeal from the District Court of the City and County of Denver, Hon. Zita Weinshienk, Judge. Judgment affirmed.

Mellman, Mellman and Thorn, P.C., Douglas W. Johnson, Denver, Colorado, for plaintiff-appellant.
Paul D. Renner, Denver, Colorado, for defendant-appellee.

Opinion by JUDGE COYTE. JUDGE SMITH dissents.

Plaintiff, Ernest Crownover, appeals from the entry of summary judgment in favor of defendant, Thomas Kennedy, M.D., in an action for wrongful death. He contends that his action was not barred by the two-year statute of limitations for wrongful death actions, § 13-21-204, C.R.S. 1973. We affirm.

Plaintiff originally filed his complaint on September 12, 1973, naming Dr. Theodore K. Gleichman as a defendant. Then, as a result of information obtained through discovery proceedings, plaintiff, on October 24, 1974, filed a motion to join Dr. Thomas Kennedy as a party defendant in an action. That motion was granted, and on November 13, 1974, he was personally served with summons and an amended complaint.

Subsequently, in response to defendant's motion, the trial court entered summary judgment for defendant Kennedy on the ground that plaintiff had failed to initiate the action against defendant within the period specified in the applicable statute of limitations. Pursuant to C.R.C.P. 54(b), plaintiff appeals that judgment. The original action naming Dr. Theodore K. Gleichman as party defendant is still pending and is not before us on appeal.

We note initially that while suit was instituted as early as September of 1973, Dr. Kennedy was not then named as party defendant; hence, the mere initiation of the law suit did not toll the statute of limitations as to the claims against him. See Hellerstein v. Mather,

360 F.Supp. 473 (D. Colo. 1973).

The chronology of plaintiff's action is as follows: On or about July 19, 1971, the defendant examined X-rays of deceased but, it is alleged, negligently failed to discover a cancerous growth shown thereon; on April 26, 1972, an operation was performed on her, at which time a number of untreatable malignancies were discovered in her body; she died on January 7, 1973; and, on November 13, 1974, this defendant was served in this wrongful death action.

The gravamen of plaintiff's argument on appeal is that the two-year statute of limitations for wrongful death actions, § 13-21-204, C.R.S. 1973, commences to run on the date of death, and that consequently plaintiff's amended complaint against defendant was filed and served

in a timely manner. As authority for that argument, plaintiff relies on Fish v. Liley, 120 Colo. 156, 208 P.2d 930, which held that our wrongful death statute is not a "survival" statute, rather it creates a new cause of action. Thus plaintiff concludes that his cause of action for wrongful death did not accrue, and hence the statute of limitations could not commence to run, until the death had occurred. We disagree.

Section 13-21-204, C.R.S. 1973, provides that:

> All actions provided for by sections 13-21-201 to 13-21-203 shall be brought within two years from the commission of the alleged negligence resulting in the death for which suit is brought. [Emphasis supplied.]

In construing such statutory language,

the Supreme Court, in Franzen v. Zimmerman, 127 Colo. 381, 256 P.2d 897, held that plaintiff could not maintain a cause of action for damages for the death of her husband since suit was not commenced within two years after the commission of the alleged tort which eventually resulted in the death of the injured husband. See also Fish v. Liley, supra. Consequently, based upon the plain statutory language and the cases interpreting same, we hold that the statute of limitations in a wrongful death action begins to run on the date the damage or injury arising from the commission of the alleged negligence from which death later results becomes known or by reasonable care could have been discovered.

Plaintiff contends that this inter-

pretation of § 13-21-204, C.R.S. 1973, results in an anomalous situation; that is, where the statute of limitations begins to run prior to death, the cause of action could be barred before it ever arose. This he argues thwarts the obvious legislative intent to give survivors of a deceased, a cause of action for the death. Whatever the merits of this argument if directed at obtaining a legislative change in the statute, we find it without significance in the instant case. Also, as we rule below, the statute of limitations began to run as of April 26, 1972, thus a significant period for the limitation of plaintiff's lawsuit was available to plaintiff after his spouse's death on January 7, 1973.

Plaintiff argues that the recent

decision in DeCaire v. Public Service Co., 173 Colo. 402, 479 P.2d 964 dictates a contrary result in the instant case. We disagree.

In that wrongful death action, the trial court held that the statute barred recovery for the carbon monoxide caused death of plaintiff's child because the last act of the defendant Public Service Company relating to gas leakage from a heating system (i.e., its last inspection of the defective heating system) occurred on December 16, 1962, the lethal leakage occurred on October 30, 1963, and the action was commenced October 22, 1965, two years and ten months after the date of the alleged negligent acts. On appeal, the Supreme Court held that the action was timely brought and stated that:

> No claim or right of action existed by virtue of the negligent act alone. It arose when the negligence resulted in the injury which caused the death. [Emphasis supplied.]

In further expanding on this theory, the court stated that negligence as used in the statute of limitations means the negligent act or acts which result in or give rise to the death claim. Hence, the rule of DeCaire, is that the statute of limitations begins to run when a party has been injured or damaged by negligent acts which simultaneously or later result in death. Plaintiff therefore reasons that, in the instant case, the injury suffered was death and that the statute of limitations commenced to run therefrom. We cannot concur in plaintiff's reasoning.

We find no inconsistency between the statement of our Supreme Court in DeCaire and our position in the instant suit. Here, if, for purposes of a wrongful death action, plaintiff's deceased were damaged by the alleged negligence of defendant, that damage occurred as of the date that the undiscovered malignancies became not amenable to treatment and hence fatal. That occurred, at the latest, on April 26, 1972, that being the date that Ardyce Crownover learned of the deadly character of the previously undiscovered malignancies. Hence, at the latest, plaintiff was required to institute suit on April 26, 1974. And since the amended complaint against defendant was filed on November 14, 1974, commencement of suit was untimely and the action

was barred.

This interpretation is consistent also with the language of § 13-21-202, C.R.S. 1973. That statute provides as follows:

> When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who..... damages notwithstanding the death of the party injured. [Emphasis supplied.]

Thus, a plaintiff's right to pursue a wrongful death action is derived from and dependent upon the decedent's right to have maintained an action had death not ensued.

Judgment affirmed.

Judge Van Cise concurs.

Judge Smith dissents.

Judge Smith dissenting:

I respectfully dissent.

The majority has, in my view, based its decision on a literal interpretation of DeCaire v. Public Service Co., 173 Colo. 402, 479 P.2d 964, without adequately considering the underlying justification of that decision. Had the express wording of the statute, now § 13-21-204, C.R.S. 1973, been literally interpreted in DeCaire, the suit by DeCaire would have been barred. There was no question that DeCaire filed his action much later than two years after the commission of the allegedly negligent act. The Supreme

Court, however, reasoned that no claim or right of action existed by virtue of the negligent act alone, but that it was the injury which caused the death that completed the tort and gave rise to the cause of action.

Thus, the court in DeCaire, in my view, interpreted the statute, as a matter of public policy, in such a way as to insure that potential plaintiffs have a full two years to investigate and consider whether to file a lawsuit after they become aware that they may have a cause of action. A contrary holding would have created the possibility that a plaintiff's cause of action under the wrongful death statute might be extinguished before he suffered injury or had other cause to know of the negligent act.

Examination of the record in DeCaire shows that the decedent died the day following the injury which resulted from the negligent act. In light of that fact it did not matter whether plaintiff's cause of action was considered as accruing on the date of injury or the date of death. Hence, for the purposes of determining when negligence was complete, death occurred at substantially the same time.

Such is not the situation presented here. If plaintiff's cause of action accrued on the date of decedent's discovery of her injury, her husband has filed his action too late. If the cause of action accrued on the date of decedent's death, plaintiff has initiated his suit within the statute of limitations.

The majority insists that DeCaire should be rigidly interpreted. However, it has not attempted to explain why we should strictly construe the words of the Supreme Court when to do so results in possibilities equally absurd as those which the Court, by its liberal construction of the statute, avoided in DeCaire.

Plaintiff's spouse died on January 7, 1973. So far as defendant's liability is concerned, that date was entirely fortuitous. Had she not died until April 27, 1974, the rule adopted by the majority would foreclose plaintiff's suit for wrongful death, as barred by the statute of limitations, even before his spouse's death occurred. Therefore, the longer she lived, the shorter the statute of limitations applicable to her spouse's

cause of action for her wrongful death. I cannot bring myself to assist in the birth of such an absurd rule, especially since "death" is a prerequisite to, and essential element of, the action. An interpretation of the statute which results in foreclosure of the right to sue even before that right becomes viable is not acceptable to me.

I believe this court should heed the underlying policy of DeCaire and adopt the rule that plaintiff's cause of action did not arise until the alleged negligence had resulted in the death of his spouse. There is ample support for this position in the case. E.g., Western & Atlantic R.R. v. Bass, 104 Ga. 390, 30 S.E. 874; Bickford v. Furber, 271 Mass. 94, 170 N.E. 796, 70 A.L.R. 469; Coury v. General

Motors Corp., 376 Mich. 248, 137 N.W. 2d 134; Hoover's Administratrix v. Chesapeake & Ohio Ry., 46 W.Va. 268, 33 S.E. 224.

I would reverse the decision of the trial court and remand with directions to reinstate plaintiff's case.

APPENDIX "C"

IN THE DISTRICT COURT IN AND FOR THE

CITY AND COUNTY OF DENVER

STATE OF COLORADO

Civil Action No: C-39168 Ct. Rm. 1

ERNEST CROWNOVER AND ERNEST CROWNOVER, surviving spouse of ARDYCE CROWNOVER,	)	
Plaintiff,	)	
vs.	)	RULING OF THE COURT
KENNETH C. SAWYER, JR., M.D., and THEODORE K. GLEICHMAN, M.D.,	)	
Defendants.	)	

THE COURT: On this issue, I really don't think the Court has any discretion because I think the statute is very clear, unambiguous, and the dates are rather unambiguous. The cancer was discovered April 26th, 1972, which would be the date of the discovery of any possible negligence since it was not until that date

that the deceased or the family suspected that there was cancer.

The actual alleged date of the negligence was July of '71 when certain X-rays were taken. Now, the question raised is what -- when does the statute of limitations start running, and both sections cited to the Court are very clear. Wrongful death section indicates that the action shall be brought within two years from the commission of the alleged negligence resulting in the death, not from the death, but from the negligence resulting in the death, which in this case was July of '71. However, we cannot use that date because it's very clear that the time does not start running until the person either discovered or in the exercise of reasonable diligence and concern should have discovered the seriousness and the character of the injuries and the negligence or breach of

contract which gives rise to the injuries, and also the DeCaire case says -- this particular case, the injury was not -- did not occur until the time of death. That case is very clearly a unique and different case and actually upholding the fact that there has to be injuries or negligence discoverable before the time runs. In other words, the party in DeCaire had no reason to know of negligence until the death, but in this case, there was clearly negligence known April -- should have been known -- April 26, '72, when cancer was found and when all of the information about the prior treatment either should have been known or was known, there being no reason shown by the plaintiff why in the exercise of reasonable diligence, it could not have been known. And the Court feels that there is really no discretion there.

The statute of limitations runs un-

der the statute from April 26, 1972. The case should have been filed within two years of April 26, 1972, and therefore, is barred by the statute of limitations. That's the only way I can possible interpret the statute, case law, and if I am in error, I'm sure that a higher court will reinterpret, but I see no -- I see no alternative to this decision under the interpretation of the statutes. There has not been any showing why it could not have been discoverable at an earlier time during the two year period running from April 26, 1972, and I'm -- I realize that the attorneys didn't discover it until some later time, and I'm not questioning that. It's just that the deceased and her family certainly knew about the prior treatment, or should have known, and in the exercise of reasonable diligence, this could have been discovered.

The Court will accordingly grant the motion for summary judgment as to Doctor Kennedy only, and I don't think it's necessary in view of my ruling to make a ruling on any other motions, Mr. Renner. Is there any problem on any --

MR. RENNER: No, I think that renders the other motions moot, your Honor.

THE COURT: Okay. The motion is granted to -- motion for summary judgment -- as to Kennedy only based upon the statute of limitation statutes in the State of Colorado.

Anything further that you want taken up at this time?

MR. JOHNSON: No, your Honor.

(END OF PROCEEDINGS)